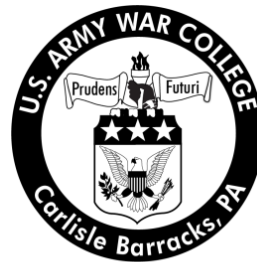


## The National Guard On The Southwest Border: Defining The Role

by

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United States Army War College  
Class of 2012

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# USAWC STRATEGY RESEARCH PROJECT

## THE NATIONAL GUARD ON THE SOUTHWEST BORDER: DEFINING THE ROLE

by

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## **ABSTRACT**

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The National Guard's role in the War on Terror continues to decrease with the troop draw down in Iraq and Afghanistan, while multiple threats on the Southwest border continue to increase. Americans are expressing growing concerns over organized crime and international terrorism and the government's ability to secure the Southwest border in the face of those threats are in question. It is time for the United States to examine the National Guard's role and mission in relation to defending the homeland. In a time of significant budget cuts and downsizing of all government organizations, the use of the National Guard to permanently augment the Department of Homeland Security is a viable option. The National Guard can contribute additional capabilities and capacities in equipment and manpower to augment the Border Patrol and help fill gaps in border security. The gains made by the National Guard since 911 are exponential and a reversal to the pre 911 eras of strategic reserve status will make the National Guard less relevant. It is time to define the role and mission of the National Guard on the Southwest border.





## THE NATIONAL GUARD ON THE SOUTHWEST BORDER: DEFINING THE ROLE

All across the country, in every region, every city and town, Americans want the federal government doing everything it can to secure our borders.<sup>1</sup>

—Janet Napolitano  
Secretary of Department of Homeland Security

Ten years after the attacks on the World Trade Centers, the United States finds itself in one war, closing out a second, and in addition spending billions of dollars each year to secure the country. Presidents Bush and Obama considered the security of the U.S. Southwest border at risk, as both deployed National Guard troops to augment the Border Patrol. National Guard troops currently remain on the border providing intelligence, surveillance and reconnaissance and infrastructure support. Multiple threats, and shortfalls in the United States Customs and Border Protection (CPB) capabilities and capacities to combat those threats, continue to hamper border security. These shortfalls, threats and a porous Southwest border combine to create an opportunity for possibly using the National Guard to augment the Border Patrol permanently. The National Guard can contribute additional capabilities and capacities in equipment and manpower to augment the Border Patrol and help fill gaps in border security. The National Guard currently provides Southwest border support to the Border Patrol; however, the intention of the augmentation is to allow the CBP time to increase capabilities and capacities. There is no long term plan to permanently leave the National Guard on the Southwest border. This paper addresses the threats, civilian capabilities and functions, shortfalls in capabilities and capacities, precedence, legality, risks, and appropriateness of military support on the Southwest border. This paper argues that the National Guard is a viable option to augment the Border Patrol on a permanent basis

and continue to support with intelligence, surveillance, reconnaissance and infrastructure support.<sup>2</sup> Now is the time to define the National Guard's mission and role on the Southwest border.

Security controls and policies at America's borders enable the flow of millions of people and facilitate the transactions of billions of dollars of legal commerce each year. Nevertheless, illegal activity exists and sophisticated illegal enterprises are competing to exploit porous borders.<sup>3</sup> The four common types of threats that compete along this gateway are traditional customs and border policing crimes, gangs, transnational criminal organizations (TCO) and transnational terrorist organizations (TTO).<sup>4</sup>

Traditional customs and border policing crimes include illegal immigration, alien smuggling, and narcotics trafficking. All impact the overall quality of life of border residents, economic expansion and environmental protection.<sup>5</sup> Most traditional law enforcement centers on the arrests of illegal immigrants. Federal law enforcement estimates that law enforcement apprehends 10 to 30 percent of illegal aliens who cross the border. A 2005 estimate indicated that as many as 4 to 10 million illegal aliens crossed into the United States during that year.<sup>6</sup> In 2010, CBP turned away over 227,000 aliens who attempted to enter illegally and apprehended more than 8,400 people for various crimes, including murder, rape, and child molestation. CPB also seized over 870,000 pounds of illegal drugs, \$147 million in currency, more than 29,000 fraudulent documents, and over 1.7 million pieces of prohibited plant materials, meat, and animal byproducts.<sup>7</sup> CBP and local law enforcement efforts resulted in a decrease in apprehensions of 36 percent nationwide from 2008 to 2010 with the majority of the decrease coming from the Southwest border. CBP views this as an indication that

efforts are effective and that fewer people are attempting to cross the borders illegally. However, drug seizures continue to increase by over 50 percent and CBP estimates that they only seize 10 to 20 percent of drugs crossing the border.<sup>8</sup>

The threat posed by gang involvement in drug trafficking is increasing, particularly in the Southwest Region and their influence continues to be a threat to both law-abiding citizens and law enforcement officers.<sup>9</sup> Gangs form the network for retail drug distribution in the United States and are the dominant retail drug suppliers in large and midsized cities.<sup>10</sup> Additionally, the Southwest border remains the primary gateway for moving illicit drugs into the United States.<sup>11</sup> In 2009, the U.S. Department of Justice (DOJ) estimated that approximately 28,100 gangs with over 731,000 members operated in the United States.<sup>12</sup> These gangs vary in size from a few members to tens of thousands, and their affiliations range from loose ties to coalitions of highly structured multinational enterprises.<sup>13</sup> Gangs use drug distribution revenues to buy weapons and fund other criminal activity, such as kidnapping, racketeering, and property crime. This activity impacts large cities throughout the United States and is not strictly limited to border cities. Many gangs have a direct or indirect involvement with the border for trafficking purposes and their connection to cartels continues to grow.<sup>14</sup> In 2010, at least 15 U.S. gangs reportedly collaborated with Mexican TCOs in attempts to traffic drugs.<sup>15</sup> DOJ estimates that the costs associated with suppressing gang activity is over \$1 billion a year.<sup>16</sup> Securing the border would impact far more than just border areas and help make the United States safer.

A fast growing threat to the Southwest border is the transnational criminal organizations.<sup>17</sup> The Southwest border hosts robust legal commercial activity, however,

the border is also the site for violent criminal activity. These enterprises are carried out by organized criminal organizations and include the smuggling of drugs, humans, weapons and cash.<sup>18</sup> Furthermore, this generation of sophisticated and violent cartels is presenting significant challenges to U.S. law enforcement.<sup>19</sup> In 2009, Mexican officials estimated that cartels murdered between 6,500 and 8,000 individuals in Mexico. By 2010, the number increased to more than 11,600 drug related homicides and an estimated 34,500 total deaths since 2006, making the Mexican border one of the most dangerous areas in the world.<sup>20</sup> The struggle for control of lucrative smuggling corridors leading into the United States is creating unprecedented levels of violence.<sup>21</sup> Increased pressure put on the cartels by both Mexican and U.S. security officials is forcing cartels to escalate their tactics, and U.S. law enforcement increasingly experience violent encounters with cartel members.<sup>22</sup> Cartels control much of the production, transportation, and wholesale distribution of illicit drugs bound for and in the United States.<sup>23</sup> Increasing coordination among Mexican drug cartels, human smuggling networks and U.S. based gangs continue to add to security problems.<sup>24</sup> Additionally, these organizations operate with military style weapons and technology that rival or exceed CBP and local law enforcement capabilities.<sup>25</sup> Law enforcement agrees that little crosses the respective cartel territories along the border without cartel knowledge and that certain cartels are now authorizing the use of force inside the United States to protect their illegal drugs.<sup>26</sup> Law Enforcement agencies continue to report cartel violence spillover creeping closer to a permeable Southwest border, reinforcing the need for continued vigilance.

The threat of transnational terrorist infiltration through U.S. borders remains a critical concern. Each year, U.S. law enforcement agencies apprehend hundreds of Special Interest Aliens (SIA) from Special Interest Countries (SIC) with known ties to terrorist organizations.<sup>27</sup> CBP reported apprehending 59,017 other than Mexicans (OTMs) in 2010, most of whom were apprehended along the Southwest border. OTMs apprehended included 663 from SICs with known terrorisms ties. These countries include Iran, Syria, Cuba, Saudi Arabia, Afghanistan, Somalia, Sudan, Pakistan and Yemen.<sup>28</sup> Admittedly, not all SIAs are terrorists and it is difficult to quantify the true threat that terrorists pose to U.S. borders. Nevertheless, indicators of the threat are clear. For instance, members of Hezbollah, the Lebanon-based terrorist organization, have already entered the United States by way of the Southwest border. In 2002, authorities arrested Salim Mucharrafile, a café owner in Tijuana, Mexico, for smuggling more than 200 Lebanese people into the United States, including several believed to have ties to Hezbollah.<sup>29</sup> Also, in March 2005, Mahmoud Kourani, an illegal alien who had been smuggled across the U.S.-Mexico border after bribing a Mexican consular official in Beirut for a visa, pleaded guilty to providing material support to Hezbollah. Officials discovered that Kourani was the brother of the Hezbollah Chief of Military Operations in Southern Lebanon, and would eventually be found to have solicited funds for Hezbollah terrorist activities from his home in Dearborn, Michigan.<sup>30</sup>

The most recent indication of potential TTO activity along the Southwest border is the alleged attempt by Iran to assassinate the Saudi ambassador to the United States. The United States charged two men, including a member of Iran's special foreign actions unit known as the Quds Force, in New York Federal Court with

conspiring to kill the Saudi diplomat, Adel Al-Jubeir. Justice Department officials say the men tried to hire a purported member of a Mexican drug cartel to carry out the assassination with a bomb attack while Al-Jubeir dined at his favorite restaurant. The purported member happened to be a paid informant for the Drug Enforcement Administration, who exposed the plot.<sup>31</sup>

A significant portion of illicit alien traffic is part of organized criminal and potential terrorist activity, and poses a sizable threat to U.S. national security.<sup>32</sup> The large number of aliens attempting to enter the country illegally could unintentionally provide cover for terrorists and allow them to leverage illicit networks to smuggle a person or weapon of mass destruction into the United States.<sup>33</sup> Although cartels are the fastest growing threat, the case could be made that it is only a matter of time before terrorists take advantage of current conditions and attack the United States. It stands to reason that sophisticated terrorist organizations will find other avenues to attack the United States as increased security closes traditional avenues. CBP acknowledges that the potential exists for a single person or small group to cross the border carrying chemical or biological weapons, weapons of mass effect, or other implements of terrorism, and they could cross undetected.<sup>34</sup>

These concerns prompted the last two U.S. Presidents to react by placing National Guard troops on the Southwest border. President Bush, before his decision to deploy National Guard troops, stated that “the need to enforce our border is urgent, and that’s why, in coordination with our governors, we’re going to send 6,000 National Guard troops to be deployed on the southern border.”<sup>35</sup> Prudence would suggest that National Guard Troops remain on the border due to continuing threats of violence

spillover from Mexico's drug war, and from the ever increasing concerns over the potential for TTOs to cross unsecure borders while being masked by the large flow of immigrants.

As threats continue to change, so have the organizations that are responsible for the protection of the border. After 9-11, the U.S. government believed that it needed to improve vigilance, increase preparedness, reduce vulnerabilities, and guard against any future attack.<sup>36</sup> A safe and secure homeland means more than preventing terrorist attacks, however. The liberties of all Americans and their privacy must be protected, as well as their safety. Protection must also preserve the means by which we interchange with the world through travel, lawful immigration, trade, commerce, and exchange.<sup>37</sup> The early 2000s brought about the most sweeping reform in government in nearly half a century, with the creation of the Department of Homeland Security (DHS) and the important recognition of the Homeland Security Enterprise. The Quadrennial Homeland Security Review of 2010 identifies the need for collective efforts and shared responsibilities of Federal, State, local, tribal, territorial, nongovernmental, and private-sector partners as well as individuals, families, and communities to maintain critical homeland security capabilities.<sup>38</sup> These organizations have a variety of functions and capabilities within the Homeland Security Enterprise.

The Homeland Security Act of 2002 established a cabinet level Department of Homeland Security and merged most interior and border enforcement functions, placing them under one agency. The four federal agencies that fall under DHS and are responsible for securing the U.S. borders are U.S. Customs and Border Protection (CBP), U.S. Immigrations and Customs Enforcement (ICE), the U.S. Coast Guard, and

the Transportation Security Administration (TSA).<sup>39</sup> Since the inception of the DHS, the number of agents has increased from about 10,500 officers to patrol borders and about 17,600 officers inspecting travelers at air, land and sea ports (Ports of Entries, POE) to over 20,000 officers for border protection and over 20,600 for security at POEs. The dollar amount associated with investment amounted to around \$11.9 billion for fiscal year 2010.<sup>40</sup>

The CBP is the primary organization within DHS that provides the front line responders to immigrations and customs violations, and is the agency responsible for the entirety of the nation's borders.<sup>41</sup> CBP combines all the previous border law enforcement agencies under one administrative umbrella. Immigration and Naturalization Service (INS), the Border Patrol, the Customs Service, and the Animal Plant Health Inspection Service make up the CBP today.<sup>42</sup> The CBP mission is to prevent terrorists and terrorist weapons from entering the country, secure the U.S. borders and ports, control flow of illegal drugs, apprehend illegal immigrants, and protect American agricultural and economic interests.<sup>43</sup>

The Southwestern border accounts for over 97% of all illegal alien apprehensions and commands the most attention from DHS and CBP.<sup>44</sup> Forty three Ports of Entry connect major U.S. interstate highways for lawful trade and commerce.<sup>45</sup> The CBP is responsible for enforcing U.S. immigration and federal laws along the border between official ports of entry. The National Border Patrol Strategy of 2005, defines the mission and focuses on five objectives: establishing the substantial probability of apprehending terrorists and their weapons as they attempt to enter illegally between ports of entry; deterring illegal entries through improved enforcement; detecting, apprehending, and



detering smugglers of humans, drugs, and other contraband; and leveraging “Smart Border” technology to multiply the deterrent and enforcement effect of agents; reducing crime in border communities, thereby improving the quality of life and economic vitality of those areas.<sup>46</sup> The National Strategy lays the foundation for gaining operational control of the border, focusing on the ability to detect, respond to and interdict border penetrations in high priority threat potential areas. The strategy builds on “Prevention through Deterrence” and relies on agents to rapidly deploy in response to threats.<sup>47</sup>

The Border Patrol divides the Southwest region geographically into nine Border Patrol sectors and conducts a three-tiered border enforcement strategy. Line watch, roving patrol and checkpoints make up the three tiers. As of 2010, over 88 percent of border patrol agents nationwide are dedicated to the Southwest border, totaling over 20,000 personnel and an expense of over 3 billion dollars a year. Most of the Border Patrol’s agents perform line watch operations and maintain a high profile to deter, arrest or turn back anyone attempting to illegally enter the United States. The second tier, roving patrols, has the responsibility to detect and arrest those who make it through the first line of defense and is located behind the line watch elements.<sup>48</sup>

Checkpoints make up the third tier of defense for the Border Patrol. Permanent and tactical checkpoints are located 25 to 100 miles inland and located on major U.S. highways and secondary roads. Permanent checkpoints are fixed facilities that include buildings, technology and computers linked with national law enforcement databases, and operate on major U.S. highways. In eight of the nine Southwest border sectors, there are 32 permanent checkpoints and one under construction in the Tucson Section. Tactical checkpoints are temporary in nature and do not have permanent structures.

Tactical checkpoints augment permanent checkpoints by monitoring and inspecting traffic on secondary roads and focus on areas used by illegal aliens and smugglers attempting to evade permanent checkpoints.<sup>49</sup> As of 2008, there were 39 tactical checkpoints in operation. The non-permanent status of tactical checkpoints affords the Border Patrol the ability to change locations on a daily basis. About four percent of Border Patrol Agents man checkpoints; however, checkpoints represent about 35 percent of drug seizures and about two percent of apprehensions on the Southwest border.<sup>50</sup>

In 2006, DHS initiated the Secure Border Initiative program (SBI), which added technology and fencing capabilities to the Southwest border. As of May 2011, DHS erected 649 miles of fencing, 299 miles of vehicle barriers, and 350 miles of pedestrian fencing in selected locations. The initiative included the purchase of unmanned aircraft systems (UAS). DHS currently has seven UASs operating throughout North America and plans to expand their fleet to 24 total UASs by 2016, including 11 on the Southwest border.<sup>51</sup> SBI added non-intrusive inspection systems, Remote Video Surveillance Systems (RVSS), thermal imaging systems, radiation portal monitors, and mobile license plate readers. The SBI initiative has cost over \$4.4 billion to date and has improved border security, but has failed to achieve the levels of security desired.<sup>52</sup>

Despite these massive efforts significant shortfalls in securing the Southwest border remain. These shortfalls in capabilities and capacities are in the areas of manpower, checkpoint operations, fencing, and patrolling.

Manpower shortages continue to hamper the progress of the Border Patrol to secure the border. As of March of 2011, the Border Patrol reported achieving varying

levels of operational control on the Southwest border.<sup>53</sup> The Border Patrol classifies operational control into two levels of control: controlled and managed. Controlled is defined as the ability to deter or detect and apprehend illegal entries at the immediate border and managed is a multi-tiered deployment of Border Patrol resources to deter, detect, and apprehend illegal entries into the United States. Managed level of control spans out to 100 miles or more away. The Government Accountability Office (GAO) recently declared that of the 873 miles of border under operational control, 15 percent is controlled and the remaining 85 percent is managed.<sup>54</sup> GAO also reported that nearly two-thirds of the 1,120 Southwest border miles that had not yet achieved operational control were at the “monitored” level. Monitored means that across these miles, the probability of detecting illegal cross-border activity is high; however, the ability to respond is defined by accessibility to the area or availability of resources. The remaining miles remain at “low-level monitored,” meaning that resources or infrastructure inhibited detection or interdiction of cross-border illegal activity. The Border Patrol report that these two levels of control are not acceptable for border security.<sup>55</sup> DHS also acknowledges achieving an acceptable level of border control across less than half of the Southwest border.<sup>56</sup>

The Border Patrol continues to have problems with checkpoint operations, as well. GAO reported in August 2009 that the Border Patrol lacked the measures to adequately operate these checkpoints effectively and efficiently, and weaknesses in checkpoint design and operation increased the risk that illegal activity may travel to the U.S. interior undetected. Border Patrol officials said that several factors impeded higher

levels of performance, including insufficient staff, canine teams, and inspection technology.<sup>57</sup>

The inability of the Border Patrol to adequately patrol fenced areas continues to be a problem. According to CBP, during fiscal year 2010, there were 4,037 documented and repaired breaches of the fencing; CBP spent \$7.2 million to repair the breaches, or an average of about \$1,800 per breach.<sup>58</sup>

Due to continuing threats and shortfalls in capabilities and capacity, DHS requested National Guard assistance in July of 2010.<sup>59</sup> At present, National Guard troops are positioned on the border in an effort to combat the transnational criminal organizations that smuggle weapons, cash and people across our Southwest border.<sup>60</sup> The inability of DHS to obtain operational control of the border indicates that there is a need for additional support and has border governors, congressmen and senators requesting National Guard support.<sup>61</sup> U.S. Senators John McCain (R-AZ) and Jon Kyl (R-AZ) introduced the Border Security Enforcement Act of 2011, which is a 10-point comprehensive border security legislation to combat illegal immigration, drug and alien smuggling, and violent activity along the border between Mexico and the United States. This legislation includes the request to immediately deploy no fewer than 6,000 National Guard troops to the Southwest border and deploy 5,000 additional Border Patrol agents to the Southwest border by 2016.<sup>62</sup> The concern expressed in the McCain-Kyl initiative is not isolated. In a letter forwarded by the National Treasury Employees Union to Senator Joe Lieberman, the CBP was reported to be understaffed and requiring more manpower to provide even minimal security to the borders.<sup>63</sup> Similarly, a recent article in

*The Journal of Strategic Security* cites a recommendation to double the CBP workforce in the next five years.<sup>64</sup>

While the Border Patrol's Strategy still includes the ambitious goal of gaining operational control of our nation's borders<sup>65</sup> current concerns over the climbing U.S. debt may have significant impacts on the DHS budget and future manning and equipment initiatives. The Fiscal Year 2011 budget included a requested reduction of 181 border agents for the Southwest border area.<sup>66</sup> This reduction coupled with a ten percent attrition rate for the CBP may have an impact on the ability to obtain desired control of the border.<sup>67</sup> Although the Border Patrol continues to increase operational control on an average of 126 miles each year, there is plenty of room for improvement.<sup>68</sup> The Border Patrol credits the slow progress primarily to having to prioritize its resources to sectors deemed to have greater risk from illegal activity and diverting assets from other areas.<sup>69</sup> Placing the National Guard on the border permanently to augment the Border Patrol could be one step taken to help to facilitate achieving operational control of the border in the face of shortfalls that currently exist and those that appear to be forthcoming.

The formation of the U.S. Border Patrol in 1924 marked the transfer of responsibility for securing the border, away from the military to a new Federal agency.<sup>70</sup> From that point, the role of the military on the border was largely non-existent until the 1980s. The passing of the Defense Authorization Act of 1982 reestablished a role for the military in support of law enforcement in the nation's so called "War on Drugs." This Act allowed the military to operate and maintain military equipment on loan to federal law enforcement agencies, train law enforcement officers, and report and share

information on criminal activity.<sup>71</sup> The passing of the Defense Authorization Act of 1989 expanded upon the 1982 authorizations by allowing the U.S. military to loan equipment to state, and local law enforcement agencies in counter drug and drug interdiction operations.<sup>72</sup> Although these Acts greatly enhanced the military's capability to support civil authorities, it did not allow the military to directly participate in police activities.<sup>73</sup>

Operation Jump Start, initiated in 2006, authorized the deployment of up to 6,000 soldiers along the borders of Texas, Arizona, New Mexico, and California. National Guard Soldiers and Airmen served along the border to support the U.S. Border Patrol's efforts to stem the flow of illegal immigrants into the United States.<sup>74</sup> President Bush made it clear that National Guard soldiers would only support the Border Patrol by operating surveillance systems, analyzing intelligence, installing fences and barriers, building and improving patrol roads and providing training. Guard members did not serve in a direct law enforcement role, but provided much needed reinforcement to the Border Patrol.<sup>75</sup>

By the time Operation Jump Start ended in July of 2008 over 30,000 National Guardsmen had participated in the unprecedented operation from across the nation. During this time, there was a reduction in both criminal activity and the apprehension of illegal aliens on the border.<sup>76</sup> Operation Jump Start officially ended on July 15, 2008.<sup>77</sup>

President Obama authorized the call up of 1,200 National Guard troops in May of 2010. This authorization was in response to requests from the four border state governors to provide support in the fight against illegal immigration and criminal activity along the border.<sup>78</sup> National Guard troops currently remain on the border helping with intelligence work, drug and human trafficking interdiction, and relieving border guards

on security tasks in order for them to conduct more law enforcement activities.<sup>79</sup> The National Guard is providing support, but are not arresting or engaging in enforcement activities directly attributed to any illegal crossing of aliens or narcotics.<sup>80</sup> Deployment of National Guard troops provide enhancement to border protection and law enforcement personnel from DHS and DOJ to target illicit networks trafficking in people, drugs, illegal weapons, money, and the violence associated with these illegal activities.<sup>81</sup>

Shortages in manpower and equipment, the continual increase of threats, and the demand from Border States, all point to the need for filling the gaps in order to secure the Southwest border. However, using the military on the border invokes valid questions particularly in respect to the legality, risks and appropriateness associated with such an option.

Specific constitutional authority and legislative acts permit and limit the use of military forces on the borders. The constitutional authority that permits Congress and the President to deploy armed forces are contained in Articles I, II and IV of the United States Constitution. Article I, Section 8 authorizes Congress “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>82</sup> Article II, section 2 establishes the President’s authority to faithfully execute the laws of the United States and to serve as the Commander in Chief of the Army and Navy, as well as the Militia of the States.<sup>83</sup> Article IV requires the federal government to protect each State against invasion and against domestic violence.<sup>84</sup>

The Posse Comitatus Act (PCA) of 1878 is the primary act that limits military participation in civilian law enforcement within the United States. The PCA states “Whoever, except in cases and under circumstances expressly authorized by the

Constitution or Act of Congress, willfully uses any part of the Army as a posse comitatus<sup>85</sup> or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”<sup>86</sup> The PCA is the legal framework that restricts the operation of active duty military within the borders of the United States. This act forbids the direct participation of active duty military personnel in search, seizure, arrest, or other similar activity during support activities to civilian law enforcement agencies.<sup>87</sup> The PCA does not prevent the military services from supporting the police, nor does it preclude them from enforcing the law when so ordered by the president. It does prevent them from being the police under normal circumstances.<sup>88</sup>

The PCA applies to federal forces and does not apply to the National Guard unless they are “federalized.”<sup>89</sup> The National Guard may be called to active duty in an exclusively federal status (Title 10 of the United States Code), in an exclusively state status, or under state control with federal pay and benefits (Title 32 of the United States Code).<sup>90</sup> Title 10, for instance, is the authority that National Guard units are serving overseas in support of Operation Enduring Freedom in Afghanistan. Under a Title 10 duty status, National Guard personnel operate under the control of the President, receive federal pay and benefits, and are subject to the PCA.<sup>91</sup> Under Title 32 duty status, National Guard personnel generally serve a federal purpose and receive federal pay and benefits, but command and control remain with the governor.<sup>92</sup> As an example, in Operation Jump Start, National Guard troops remained in a Title 32 status and under control of the governors of the four states. This status would allow the National Guard forces to provide the maximum extent of administrative and command flexibility for support.<sup>93</sup>



The exception to the PCA is when the National Guard remains under control of a state, in a Title 32 or a state active duty status,<sup>94</sup> and does not enter into a federal status.<sup>95</sup> However, once federalized, National Guard troops fall under a Title 10 duty status and PCA applies.<sup>96</sup> The use of the National Guard tends to be the best fit for use of military forces for a border mission. This is due to the ability of border governors to maintain National Guardsmen in a Title 32 duty status and exempt them from the restrictions of the PCA. This exemption allows more flexibility for use, if required.

The passing of three Acts expanded the role of the military support to law enforcement agencies. In 1981, Congress passed the Military Cooperation with Law Enforcement Agencies (MCLEA) Act, which prescribed how the DOD could assist in the war on drugs. The Act permits the military to execute the following supportable activities: sharing of information; loaning equipment and sharing facilities; providing expert advice and training; and maintaining and operating equipment in conjunction with counterterrorism operations or the enforcement of counterdrug laws, immigration laws, and customs requirements.<sup>97</sup> The National Defense Acts of 1991 and 2006 expanded DOD support to federal, state, and local law enforcement agencies in support of counterdrug and counterterrorism operations. The 1991 Act provided for the construction of roads, fences, and lighting along the U.S. border; providing linguists and intelligence analysis services; conducting aerial and ground reconnaissance; and establishing command and control networks to integrate with law enforcement and military activities.<sup>98</sup> The 2006 National Defense Act authorizes the military to deploy assets to the border to assist DHS in order to deny terrorists, drug traffickers, and unauthorized aliens. However, military forces are to only provide an augmenting

capability and operate in a supporting role to federal, state and local law enforcement.<sup>99</sup>

The military was not to perform any direct law enforcement activities, which enabled them to support and remain within the limits of the PCA.

The use of the military to aid in securing the Southwest border has inherent risks and the United States will need to address the mitigation of those risks. Primary risks include concerns surrounding lethality and the perception of militarization on the one hand; and the high operational tempo of the National Guard on the other. Although not all inclusive, these are risks that will require attention.

The modern National Guard has become a combat seasoned force whose lethal potential may raise concerns when placed in a border security mission. However, among today's threats are heavily armed organizations that easily rival or exceed the protection afforded the Border Patrol.<sup>100</sup> Increased pressure placed on cartels by Mexican and U.S. security officials has caused the cartels to escalate their tactics. U.S. law enforcement officials increasingly experience violent encounters with cartel members.<sup>101</sup> Rick Flores, a Texas Sheriff, spoke before a congressional hearing in 2006 and said that "cartels utilize rocket propelled grenades, automatic weapons, and use body armor and Kevlar helmets."<sup>102</sup> In January 2006, law enforcement agencies seized a large cache of weapons in Laredo, Texas. Among the items seized were two completed improvised explosive devices and materials for making thirty-three more. They also found large quantities of AK-47 rifles, ammunition, and bullet proof vests.<sup>103</sup> Attacks on CBP agents continue to increase on the Southwest border. Between 2009 and 2010, CBP agents experienced a 45 percent increase in assaults against them.<sup>104</sup> Introduction of military forces, serving alongside CBP agents, could potentially serve as

a deterrent to these kinds of assaults. An armored high mobility multi-purpose wheeled vehicle (HMMWV) is not too much lethality to counter the types of adversaries we are discovering along the border.

However, perceptions of militarization of the border could send an unwanted message to the world that the United States may no longer be “open for business.” This goes against the U.S. open door/land of opportunity reputation. The clash between national sovereignty and the human rights of immigrants has inspired several activist groups to file suit against U.S. border enforcement policies with the Inter-American Court of Human Rights and charges of militarization are prominent in their protests.<sup>105</sup> Activists argue that soldiers have skills for military combat and are poorly suited to resolve such issues as immigration and border protection. They claim that the United States has embarked on a dangerous and far-reaching precedent at a time when anti-immigrant hysteria is rampant.<sup>106</sup>

However, it is important to note that these arguments only apply to immigration issues and do not address either criminal or terrorist threats on the border. An Opinion Research Corporation poll conducted in May 2006 showed that 64 percent of Americans were in favor of sending National Guard troops to the border.<sup>107</sup>

In order to mitigate the perceptions of too much lethality and a militarized border, the United States will need to establish a strategic communication plan to reassure the American people. The foundation of that plan should be a simple depiction of the mission. The National Guard is currently augmenting the Border Patrol, supplementing surveillance, increasing intelligence analysis and providing engineer support. It is not arresting, apprehending, detaining or incarcerating aliens. The military understands that

it is not their job to be a police force, nor are they trained for those types of missions.

The intent is not to be another law enforcement agency, but merely an augmentation to the CBP.

The strategic communication plan will also need to communicate that we are not enforcing laws against American citizens, but against illicit trafficking and illegal aliens, while reinforcing between the ports of entry and under control of DHS and the Border Patrol. Americans must understand that this is a measure to prevent illegal entry by organizations and people with intent to do harm to the United States and its citizens. The National Guard, if needed, could provide a response with the capabilities required to counter any external threats that may potentially escalate beyond the capability of the CBP.

The United States runs the risk of potentially overextending its reserve components through a permanent military solution for securing the border. Governors may balk at relinquishing their units to go and support border missions. This possessive nature is understandable, as they feel they need these assets in their state in case of an emergency. The current operational tempo of the National Guard has been high due to the wars in Iraq and Afghanistan and left many states with lower troop levels to respond to emergencies. During Operation Jump Start (OJS), governors retained the authority to decline OJS missions that might degrade their own ability to respond to crises.<sup>108</sup> The National Guard's ability to deploy over 30,000 citizen soldiers and airmen from across the nation while having close to 50,000 soldiers deployed to support overseas contingency operations demonstrates that non-border governors recognized the shared

need to respond. This is a gateway issue that requires a national response, and the National Guard has been willing to pay their part.

This risk is decreasing as U.S. troops are coming out of Iraq. Permanent missions and an established number of forces required to augment Border Patrol will bring some predictability to this mission. The use of the Army Force Generation model (ARFORGEN) can identify a long term, unit rotation plan that takes into consideration the requirements of each state. The National Guard Bureau can implement a sourcing plan for units to rotate through this mission and balance the War on Terrorism.<sup>109</sup>

The National Guard's number one priority is the security and defense of our homeland, at home and abroad and is the appropriate force of choice for supporting border security. The inherent mission of the National Guard, as the first military line of defense for the homeland, helps to make the National Guard's use on the border a natural fit, aligning that mission with their long standing role. The former Acting Director of the Army National Guard, MG Raymond Carpenter, recently addressed Army War College Students, and reminded the audience that the National Guard must continue to stay meaningful and engaged to continue to be relevant.<sup>110</sup> A permanent border solution could give the National Guard that meaningful engagement. MG Carpenter further stated, "The National Guard is the right force, as well as the force of choice for a border mission. The National Guard is capable of providing the full spectrum of options regarding support to the CBP, from observer missions to security missions of great intensity. Although not routine to the Guard prior to 9-11, it fits with our dual mission responsibly, federal and state, to protect the citizens of our country."<sup>111</sup>

The Army National Guard currently has over 350,000 personnel and 28 Brigade Combat Teams (BCT) in its ranks that could fulfill a permanent brigade size mission on the border and not impact current troop strength required for Afghanistan.<sup>112</sup> A standardized unit to fill a border mission would facilitate numerous planning and equipping issues associated with this requirement. The use of a BCT could help National Guard Bureau standardize this mission with personnel and equipment. The National Guard currently has one BCT in Afghanistan and has no requirement to backfill it. Upon return of the 45<sup>th</sup> IBC, there will be no BCTs deployed from the National Guard and none scheduled in the foreseeable future, making the use of BCTs a feasible option for the National Guard.<sup>113</sup> BCTs have anywhere from 3,460 to 3,720 personnel, depending on the type of BCT (Light, Heavy or Stryker). The use of a BCT gives a consistent number for augmentation on the border and works well with planning and resourcing, while providing a headquarters for command and control.

The use of National Guard BCTs provides equipment that would be of great use to border security. Currently the Border Patrol uses Unmanned Aerial Systems (UAS) and night vision equipment for border security. UAS systems reside in the CBP's Office of Air and Marine division.<sup>114</sup> A BCT has four UASs and are a part of the Tactical Unmanned Aerial System (TUAS) Platoon in the Brigade Special Troops Battalion. The specialized equipment that a BCT has to offer makes the use of a BCT the most beneficial unit for a border mission. The permanent use of the National Guard to augment the Border Patrol could eliminate the need to purchase additional equipment that would be redundant, ultimately save money and afford valuable training opportunities for the National Guard.

The great strides gained over the past ten years by National Guard forces fighting in combat zones has been momentous. The permanent assignment of the National Guard on the border can capitalize on this experience and help the National Guard remain relevant to the homeland security fight. The Department of Defense, in cooperation and consultation with the Department of Homeland Security should consider implementation of the following recommendations:

*Establish permanent border regions for the National Guard.* Permanently establish regions for augmentation of the Border Patrol by the National Guard and build a permanent brigade size facility and corresponding battalion facilities to support rotational National Guard units. This will create a joint operating environment and facilitate the augmentation of the Border Patrol. The building of these facilities will address the issue of lodging and sustainment for National Guard units and ultimately be cost effective in the long run. The need to identify ideal locations for facilities will require additional studies and Border Patrol input.

*Permanently position a brigade set of equipment on border.* Position a brigade set of equipment on the border for units to fall in on. The equipment drawdown in Iraq could provide many HMMWVs and equipment for repositioning and available for use on the border. Units can deploy and fall in on the equipment much like they did in Iraq and as they are currently doing in Afghanistan. The positioning of equipment reduces costs and eases the logistics of rotating units to the border.

*Increase manning to provide for duration staff.* Department of the Army should allocate additional Active Guard and Reserve (AGR) assets to support a full time duration staff to help manage the facilities and the rotation of units. These AGR

personnel should fall under NORTHCOM and be the primary liaison for the Guard's border mission. Permanent assignment of these troops will provide continuity with NORTHCOM, rotating units and the Border Patrol.

*Establish detailed rotation plans.* Synchronize rotation plans with the ARFORGEN cycle to establish predictability and allow governors to plan for their states. Synchronized border mission rotations with potential operational deployments overseas will require careful monitoring to minimize operational fatigue of National Guard units; however, coordination between the National Guard and Forces Command can address this issue.

The implementation of these key recommendations will help establish a permanent solution for the National Guard to augment the Border Patrol on the Southwest border. The recommendations contribute to keeping the Guard operational while providing a vital, relevant mission. Although much is required to execute a plan that allows the National Guard to permanently augment the Border Patrol, this paper outlines the start point to facilitate that process.

The current mission of the National Guard does not necessarily need redefining, as their dual mission is to provide to the states trained and equipped units to protect life and liberty, while providing the nation trained and equipped units to globally defend the United States and its interests.<sup>115</sup> Permanently placing the National Guard on the border fits within these mission sets and provides an excellent capability for supporting security on the Southwest border. The mission should only include supporting the CBP with surveillance, intelligence analysis and engineering support. National Guardsmen should provide support in an augmentation role and refrain from any direct law enforcement



duties. There is no expectation that the National Guard will replace law enforcement, but only augment them to allow for increased security. The dual mission unique to the National Guard and troop draw downs facilitate the expansion of the role of the National Guard with additional Homeland Security missions. Likewise, the threats, alongside shortfalls in capabilities and capacities of the CBP support the need for additional assistance.

The use of the National Guard to augment the Border Patrol is a viable, economic and appropriate solution that can help address Americans growing concerns over organized crime and international terrorism and the government's ability to secure the Southwest border in the face of those threats. Securing U.S. borders will continue to be a prominent and growing focus of U.S. strategic planning, unilateral law enforcement, military actions and cross-border cooperation.<sup>116</sup> The many complex issues associated with controlling the security of the Southwest border will require all elements of national power. Additionally, security will need to be a coordinated effort of both interagency and intergovernmental agencies in order to ensure the level of protection required to keep the United States safe from these threats. It is time for the United States to examine the National Guard's role and mission in relation to defending the homeland and make them an integral part of protecting America's borders.

## Endnotes

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<sup>2</sup> Although threats and shortfalls in capabilities and capacities exist on the U.S. Northern and coastal borders, the public and vocal concern is the Southwest border and is the focus of this paper.

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<sup>5</sup> U.S. Customs and Border Protection, Office of Border Patrol, *National Border Patrol Strategy*, (Washington, DC: U.S. Customs and Border Protection, 2005), 11.

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<sup>14</sup> Steinmetz, "Mitigating the Exploitation," 33.

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<sup>16</sup> *Ibid.*, 12.

<sup>17</sup> *Ibid.*, 2.

<sup>18</sup> Committee on Homeland Security, *A Line in the Sand*, 2.

<sup>19</sup> *Ibid.*, 4.

<sup>20</sup> Krisin M. Finklea, *Southwest Border Violence: Issues in Identifying and Measuring Spillover Violence* (Washington, DC: U.S. Library of Congress, Congressional Research Service, August 25, 2011), 1.

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<sup>23</sup> *Ibid.*, 7.

<sup>24</sup> Steinmetz, "Mitigating the Exploitation," 4.

<sup>25</sup> Committee on Homeland Security, *A Line in the Sand*, 4.

<sup>26</sup> *Ibid.*, 6.

<sup>27</sup> *Ibid.*, 27, 28.

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<sup>30</sup> *Ibid.*, 29, 30.

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<sup>81</sup> Ibid.

<sup>82</sup> U.S. Constitution, art. I, sec. 8.

<sup>83</sup> U.S. Constitution, art. II, sec. 2.

<sup>84</sup> U.S. Constitution, art. IV, sec. 4.

<sup>85</sup> Posse comitatus means "the power of the county," reflecting the inherent power of the old West county sheriff to call upon a posse of able-bodied men to supplement law enforcement assets and thereby maintain the peace. Following the Civil War, the Army was used extensively in the South to maintain civil order and enforce the policies of the Reconstruction era. However, in reaching those goals, the Army necessarily became involved in traditional police roles and in enforcing politically volatile Reconstruction-era policies. The stationing of federal troops at political events and polling places under the justification of maintaining domestic order became of increasing concern to Congress, which felt that the Army was becoming politicized and straying from its original national defense mission. The Posse Comitatus Act was passed to remove the Army from civilian law enforcement and to return it to its role of defending the borders of the United States. For a complete explanation of Posse Comitatus, see Craig T. Trebilcock, *The Myth of Posse Comitatus*, October 2000, <http://www.homelandsecurity.org/journal/articles/trebilcock.htm>

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<sup>87</sup> Mason, *Securing America's Borders: The Role of the Military*, 3.

<sup>88</sup> 10 U.S.C., sec 375.

<sup>89</sup> A "federalized" National Guard unit is one that has been mobilized under Title 10 of the United States Code to perform a federal mission. Command and control rests solely with the President and the federal government.

<sup>90</sup> Mason, *Securing America's Borders: The Role of the Military*, 5.

<sup>91</sup> Ibid.

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<sup>93</sup> Doubler, *Operation Jump Start: The National Guard on the Southwest Border, 2006-2008*, 19.

<sup>94</sup> In "state active duty," National Guard Personnel operate under the control of their governor, are paid according to state law, and can perform activities authorized by state law.

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<sup>100</sup> Steinmetz, "Mitigating the Exploitation," 31.

<sup>101</sup> *Ibid.*, 32.

<sup>102</sup> Criminal Activity and Violence Along the Southern Border: Hearing Before the Subcommittee on Investigations of the House Committee on Homeland Security, 109<sup>th</sup> Congress, (August 16, 2006), 47.

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<sup>105</sup> Timothy J. Dunn and José Palafox, "Militarization of the Border", May 4, 2007, <http://www.uua.org/documents/washingtonoffice/immigration/studyguides/handout4.1.pdf> (accessed December 18, 2011).

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<sup>108</sup> Doubler, *Operation Jump Start: The National Guard on the Southwest Border, 2006-2008*, 72.

<sup>109</sup> COL Ted Hildreth, U.S. Army National Guard Bureau, NGB-Mobilization Readiness Branch Chief, telephone interview by author, January 6, 2012.

<sup>110</sup> MG Raymond Carpenter, Small Group Lecture (Anton Myrer Army Leader Day), U.S. Army War College, Carlisle Barracks, PA, October 18, 2011, cited with permission of MG Carpenter.

<sup>111</sup> MG Raymond Carpenter, Acting Director Army National Guard, e-mail message to author, November 14, 2011.

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<sup>116</sup> Graham H. Turbaville Jr., “US-Mexican Border Security: Civil Military Cooperation,” *Military Review*, July-August 1999.